NO. 95262-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON PUBLIC EMPLOYEES ASSOCIATION
UFCW LOCAL 365, et al.,
Respondents/Plaintiffs,

v.

STATE OF WASHINGTON, et al.,
Respondents/Defendants,

And

FREEDOM FOUNDATION,
Petitioner/Respondent/Defendant.

BRIEF OF *AMICI CURIAE* ALLIED DAILY NEWSPAPERS OF WASHINGTON, SEATTLE TIMES COMPANY, WASHINGTON COALITION FOR OPEN GOVERNMENT, WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, AND WASHINGTON STATE ASSOCIATION OF BROADCASTERS IN SUPPORT OF PETITIONER

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I. INTRODUCTION AND IDENTITY OF AMICUS CURIAE

Amici curiae, identified and described in the attachment hereto, are members and representatives of the news media throughout the state, as well as the Washington Coalition for Open Government. Collectively, they are dedicated to assuring government agencies and public servants remain transparent and accountable to those they serve, and to fostering an informed citizenry, which is the cornerstone of democracy.

This brief supplements *Amici*'s prior memorandum urging review of the decision below,[1] and offers additional points supporting reversal.

First, this case is the latest in a decades-long string of unwarranted attempts to impose a general privacy exemption on the Public Records Act ("PRA") outside the confines of the statute itself. *WPEA* closely mirrors the discredited privacy analysis of *In re Request of Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986), in which this Court discerned an implied personal privacy exemption in the PRA. That decision was overturned legislatively, and this Court has since disclaimed it. *See* § I, *infra*.

Second, this Court has consistently rejected arguments, like the one here, that the PRA's mandatory disclosure of "public records" – which by definition involve government conduct or operations – implicate

[1] *Wash. Public Emps. Ass'n v. Wash. State Ctr. for Childhood Deafness & Hearing Loss*, 1 Wn. App. 2d 225, 404 P.3d 111 (Oct. 31, 2017) ("*WPEA*").

constitutional privacy. The Court should confirm its holding in *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 883, 357 P.3d 45 (2015), that individuals have ***no*** constitutional right to suppress disclosure of public records. *See* § III.A, *infra*. Alternatively, constitutional privacy claims are subject to rational-basis review, which is easily satisfied here. *See* § III.B, *infra.*

Third, an individual's date of birth ("DOB") is not a "private affair" subject to Const. art. 1 § 7. There is ***no*** expectation of privacy in DOBs contained in public records. To the contrary, DOBs have long been available in all manner of public records, from birth certificates to voter registration databases to public agency employee files. *See* § IV.A, *infra.* Disclosure of public servant DOBs also serves important public interests. DOBs are a critical tool for assuring oversight over government. The press and others rely on DOBs to determine, among other things, who is responsible for performing various public duties, and access to DOBs facilitates news reporting on how agencies function and how tax dollars are spent. This public interest defeats any claim that public employee DOBs are "private." *See* § IV.B, *infra.*

II. THE DECISION BELOW IGNORES THE PRA'S HISTORY AND PURPOSE, AND WOULD IN EFFECT RESTORE THE DISCREDITED PRIVACY ANALYSIS FROM *IN RE ROSIER.*

Before addressing *WPEA*'s failure to apply the appropriate constitutional standard, and its erroneous conclusion that DOBs are

"private affairs" (*see* §§ III, IV), it is worth noting the historic echoes in the opinion. *WPEA* purports to create, essentially out of whole cloth, a new constitutional privacy right for public servants to suppress personal information whenever a court finds disclosure is not "justified." 1 Wn. App. 2d at 236. Its embrace of a free-floating, judicially administered "personal privacy" override to public access bears a remarkable resemblance to *Rosier* – a decision that was subsequently overruled by the legislature and disclaimed by this Court. Like the rejected analysis in *Rosier*, *WPEA* misunderstands the PRA's policy and purpose.

WPEA's cursory constitutional discussion begins by stating that an art. 1 § 7 violation occurs if "a private affair has been disturbed," unless the court determines "authority of law, such as a valid warrant, justifies the intrusion." 1 Wn. App. 2d at 233 (citation omitted). Next, the court recites some "intimate" matters that may constitute "private affairs": presence at a motel; medical diagnoses; trade secrets and financial data, and personal sexual matters. *Id.* Then, citing ***no*** evidence and ***no*** legal authority, the court holds that public employee DOBs are a similar intimate matter, subject to a constitutional expectation of privacy. *Id.* at 233-34. Finally, the court took as its task determining whether the PRA "justifies" disclosure of DOBs. *Id.* at 236. The court concluded it did not, because "this information would reveal discrete personal details of state

employees not connected to their role as public servants" and therefore "the purpose of the PRA is not served[.]" *Id.* at 236.

In *Rosier*, this Court relied on a similarly narrow view of the PRA's purpose to hold that public records – although not subject to any express statutory exemption – can be withheld whenever a court concludes disclosure of personal information is simply not "justified." *Rosier*, 105 Wn.2d at 615. *Rosier* was not a constitutional case, but its analysis tracks *WPEA*'s. *Rosier* read the PRA to imply a "general personal privacy exemption," applicable when individual names are released in connection with other information in a manner that "reveals unique facts about [the person.]" *Id*. at 609, 614. Just like *WPEA*, *Rosier* found this "general" privacy protection applied if an agency fails "***to justify the disclosure*** of the private information." *Id.* at 615 (emphasis added). The opinion rested on a narrow view of the PRA's "basic purpose," which it found was "to allow public scrutiny of government, rather than to promote scrutiny of particular individuals[.]" *Id.* at 611. This is the same logic and language used in *WPEA*, which found the PRA "does not justify" disclosure of DOBs, allegedly because "the purpose of the PRA is not served" by revealing individual information. 1 Wn. App. 2d at 236-37.

The problem with this approach is readily apparent and (now) widely accepted: as the *Rosier* dissent noted, this test "enables every

public agency and employee thereof to henceforth censor the public's access to public records, all in the fair name of 'personal privacy,'" in a manner that "eviscerates" the PRA. *Rosier*, 105 Wn.2d at 618 (Andersen, J., dissenting).[2] The legislature agreed: it swiftly amended the PRA specifically to reverse *Rosier*, and to clarify that the expectation in this state is that public records must be disclosed unless a specific statutory exemption applies. Laws of 1987, ch. 403 (now RCW 42.56.050, .070).[3]

This Court subsequently agreed *Rosier*'s analysis was incorrect, noting it did not "make sense to imagine the Legislature believed judges would be better custodians of open-ended exemptions." *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 259, 884 P.2d 592 (1994) ("*PAWS II*"). "The Legislature's response to our opinion in *Rosier* makes clear that it does not want judges any more than agencies to be

[2] The public employees in this case, if given the choice, would suppress more than just DOBs from public records about them. For example, some of Union Respondents' members assert a privacy interest in their agency work email. *See, e.g.*, CP1719 (DNR fiscal analyst: "I don't want my work email address released"); CP 1688 (DOT engineer asserting privacy right in work email address).

[3] The intent provision states: "The legislature intends to restore the law relating to the release of public records largely to that which existed prior to the Washington Supreme Court in "*In re Rosier*," 105 Wn.2d 606 (1986). The intent of this legislation is to make clear that: (1***) Absent statutory provisions to the contrary***, agencies possessing records should in responding to requests for disclosure not make any distinctions in releasing or not releasing records based upon the identity of the person or agency which requested the records, and (2) agencies having public records should rely only upon statutory exemptions or prohibition for refusal to provide public records. Further, to avoid unnecessary confusion, "privacy" as used in [RCW 42.56.050] is intended to have the same meaning as the definition given that word by the Supreme Court in "*Hearst v. Hoppe*," 90 Wn.2d 123, 135 (1978). Laws of 1987, ch. 403 (emphasis added)."

wielding broad and malleable exemptions. The Legislature did not intend to entrust to either agencies or judges the extremely broad and protean exemptions[.]" *Id.* at 259-60.

WPEA disregards this recognition of the proper role courts should play in interpreting the scope of PRA privacy. If accepted, Respondents' asserted "constitutional privacy" exemption would "eviscerate" the PRA at least as thoroughly as *Rosier*'s "general privacy" exemption, had it survived. And it would reinstate to the courts the same type of broad and protean privacy exemption this Court ultimately agreed was improper.

III. THIS COURT SHOULD CONFIRM THAT DISCLOSURE OF "PUBLIC RECORDS," AS DEFINED IN THE PRA, IMPLICATES NO CONSTITUTIONAL PRIVACY INTEREST.

In the 32 years since *Rosier*, the supposed extra-statutory right of privacy in public records has continued to be an argument in search of a theory. Litigants have attempted to suppress public records based on alleged privacy rights arising under the First Amendment,[4] the due process clause of the Fourteenth Amendment,[5] the Fourth Amendment,[6] and, as

[4] *John Doe No. 1 v. Reed*, 561 U.S. 186, 199 (2010) (release of referendum signatures in response to PRA request did not violate First Amendment right of associational privacy in light of significant "transparency and accountability" interests served by disclosure).

[5] *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 860, 120 P.3d 616 (2005) (rejecting theory that due process clause prohibited disclosure of records about teacher accused of misconduct before he could have a "name-clearing hearing"), *rev'd in part*, 164 Wn.2d 199, 189 P.3d 139 (2008).

[6] *West v. Vermillion*, 196 Wn. App. 627, 638, 384 P.3d 634 (2016) (public official has no Fourth Amendment right of privacy in public records on personal computer), *review denied*, 187 Wn.2d 1024, 390 P.3d 339 (2017), *cert. denied*, 138 S. Ct. 202 (2017).

here, art. 1 § 7.[7] Excluding the present case, these attempts have uniformly failed, and this Court has ***never*** been receptive to any of these constitutional theories. To the contrary, this Court recently recognized that "an individual has ***no*** constitutional privacy interest in a *public* record." *Nissen*, 183 Wn.2d at 883 (first emphasis added).

A. *Nissen* Squarely Holds Disclosure of Public Records Implicates No Constitutional Privacy Right.

This Court has already addressed the extent to which disclosure of information in "public records," as defined under RCW 42.56.010, implicates any constitutional privacy right. In short, it doesn't.

Nissen considered whether a county prosecutor's texts about work-related matters, held on his private cell phone, were subject to disclosure under the PRA. 183 Wn.2d at 873. The prosecutor claimed that requiring him to obtain these records from his personal device violated his constitutional right to privacy under both art. 1 § 7 and the Fourth Amendment. *Id.* at 883 n.9. This Court easily concluded that there is ***no*** such constitutional interest in a "public record:" "Because an individual has no constitutional privacy interest in a *public* record, Lindquist's challenge is necessarily grounded in the constitutional rights he has in personal information comingled with those public records." *Id.* at 883. In

[7] *Bellevue John Does, supra*, 129 Wn. App. at 861-62.

other words, any constitutional privacy interest was limited to material on his private phone falling outside the definition of "public record."

This reading is buttressed by the Court's citation (*id.* at 883 n.10) to *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977). In *Nixon*, the U.S. Supreme Court recognized that public officials have "constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity." *Id.* at 457 (noting, as an example, that "Presidents who have established Presidential libraries have usually withheld matters concerned with family or personal finances"); *id.* at 459 (privacy applied only to personal communications with family, clergy, doctors and the like). *Nixon* suggested there could be a privacy right in these private papers, *id.* at 458 – but took it as a given that this right does ***not*** apply to records that pertain to "official conduct" or were "already disclosed to the public" *Id.* at 459.

This reading also comports with the PRA's language and structure. The statute requires disclosure only of records that, by definition, "relat[e] to the conduct of government or the performance of any governmental or proprietary function." RCW 42.56.010(3) (definition of "public record"). If a record relates to government conduct or performance – the only records the PRA reaches – it is not "private" and does not implicate any constitutional privacy right, as *Nissen* and *Nixon* both recognize.

In *WPEA*, the court below dismissed *Nissen* as "dicta," limiting *Nissen*'s categorical rejection of *any* "constitutional privacy interest" in public records to cases involving agency searches for public records on private devices. 1 Wn. App. 2d at 235. This conclusion is belied by another Division Two opinion, decided less than a year earlier, recognizing the categorical rule to be the "holding" of *Nissen*. *West*, 196 Wn. App. at 641. *West* recognized that *Nissen* is not limited to "private device" cases: "The language of this holding does not limit it to only certain constitutional privacy interests nor to only those privacy interests enumerated under certain constitutional provisions. Instead, *Nissen* was clear that an individual does not have a constitutional privacy interest in public records." *Id.* at 638-39.

Further, *WPEA*'s attempt to cabin *Nissen* to its facts makes no sense. If an individual public employee has "no constitutional privacy interest in a public record" held on her private device, then, *a fortiori*, an individual public employee has no constitutional privacy interest in public records held by the government agency for which she works.

This Court should reverse the decision below as contrary to *Nissen*, and reject the Union Respondents' attempt to create a new constitutional privacy right in public records. The Court should confirm that, in any context, there is no constitutional privacy right in public records.

B. Even If Any Constitutional Privacy Right In Public Records Exists, Disclosure Is Constitutional If It Has a "Rational Basis."

To the extent this Court concludes *Nissen* is not a sufficient basis to reject Respondents' asserted constitutional privacy interest in public records, it should hold that the appropriate standard for resolving such claims is the rational-basis standard set out in the Court of Appeals opinion in *Bellevue John Does*, a PRA case. This Court also should hold that the test used in *WPEA* – which evaluates whether police searches and seizures are an invasion of privacy – is inapposite in PRA cases.

In *Bellevue John Does*, a teacher sought to enjoin release of public records related to sexual misconduct accusations. He argued "disclosing his identity would violate his right under [Article 1 § 7] not 'to be disturbed in his private affairs.'" 129 Wn. App. at 861. The Court of Appeals held that there is a constitutionally protected privacy interest in "nondisclosure of intimate personal information." *Id.* But it also held that the right is not "fundamental," and thus that the constitutionality of any disclosure is scrutinized only under the rational basis test. *Id.*; *accord, Ino Ino, Inc. v. Bellevue*, 132 Wn.2d 103, 124, 937 P.2d 154 (1997). Rational basis is the "most relaxed form of judicial scrutiny." *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 223, 143 P.3d 571 (2006).

The Court of Appeals concluded PRA disclosure easily passes

rational basis scrutiny, because the PRA meets a "valid government interest." *Bellevue John Does*, 129 Wn. App. at 861. Indeed, it found that application of this rational basis test "does not yield a different result than the privacy definition in" the statute itself. *Id.* Under that definition, privacy is invaded only if disclosure of information about the person (1) would be highly offensive to a reasonable person, ***and*** (2) is of no "legitimate concern" to the public. RCW 42.56.050. Regardless of whether a public record contains highly offensive information, a standard allowing public access to public records that ***are*** of legitimate concern to the public is, by definition, rationally related to a legitimate state interest of assuring open, accountable government. The contrary view – that there is no rational relationship between disclosure of public records of public concern, and the state's interest in assuring public oversight – is illogical.

This Court accepted review of *Bellevue John Does*, including the question of whether disclosure violated the constitutional right of privacy. *Bellevue John Does*, 164 Wn.2d at 208. It did not reach the constitutional question, however, finding the statutory issues dispositive. *Id.* at 208 n.10. The Court could resolve this case by reaching that issue here and confirming that in light of the PRA's definition of privacy, and its application only to "public records," disclosure under the PRA does not infringe constitutional privacy, and that the rational basis test "does not

yield a different result." In any case, to the extent PRA disclosure implicates constitutional privacy rights at all, alleged intrusions of that right can and should be resolved under the rational basis test.

WPEA turns this review on its head. Rather than asking whether any rational basis exists for the PRA's provisions allowing disclosure ***by the government*** of ***public*** records, *WPEA* applied a test that asks whether compelled disclosures ***to the government*** of ***private*** information violates constitutional privacy. As Petitioner details (Supp. Br. 13-15), *WPEA* applied the constitutional test used to evaluate whether the State invades individual privacy when it seizes a criminal defendant's private property,[8] collects DNA samples from felons,[9] or otherwise searches for or seizes private evidence from private parties.

Other than *WPEA* and a related Division Two case,[10] this test has not been applied outside the search-and-seizure context. And for good reason: it was never intended to evaluate release of information by the government, to the public, under a disclosure statute like the PRA. Just as in *Rosier*, a test that enables public employees to suppress public records unless the requester "justifies" disclosure would eviscerate the PRA.

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[8] *State v. Puapuaga*, 164 Wn.2d 515, 522, 192 P.3d 360 (2008).

[9] *State v. Surge*, 160 Wn.2d 65, 156 P.3d 208 (2007).

[10] *SEIU Local 925 v. Freedom Foundation*, 197 Wn. App. 203, 222, 389 P.3d 641 (2016). Although *SEIU Local 925* acknowledges *Puapuaga* as the source of its constitutional privacy test, *WPEA* does not; it cites *SEIU Local 925* as the sole authority on this point.

IV. DISCLOSURE OF DATES OF BIRTH DOES NOT VIOLATE ART. 1 SEC. 7.

Regardless of the test this Court applies, disclosure of public employee DOBs does not violate, or even implicate, constitutional privacy. DOBs are not "private affairs" (*see* § A, *infra*), and contrary to *WPEA*, they are a matter of important public interest. *See* § B, *infra.*

A. DATES OF BIRTH ARE NOT "PRIVATE AFFAIRS."

Const. art. 1 § 7 provides "[n]o person shall be disturbed in his private affairs . . . without authority of law." The decision below found that whether a matter is a "private affair" depends on "the historical treatment of the interest asserted," and "whether the expectation of privacy is one that a citizen of this State is entitled to hold." *WPEA*, 1 Wn. App. 2d at 233. The decision acknowledged there is ***no*** "historical protection" for privacy in public employees' DOBs. *Id.* at 234. Even under the inapposite privacy test applied in *WPEA*, that should have been the end of the inquiry.[11] But the court went on to conclude that public employees have an "expectation of privacy" that their "names associated

[11] *Amici* agree with Petitioner that *WPEA* misapplied the *Puapuaga* test by failing to recognize that if the matter is not historically a "private affair," there is no privacy intrusion. *See* Pet. Supp. Br., at 13-14. The Unions misconstrue this as an argument for ignoring technological advances. *See* Unions Supp. Br. 1, 6. This misses the point. Assuming a "historic" constitutional privacy test applies, the question is not whether technology makes it easier than in the past to intrude on a privacy interest. The question is whether, historically, "the *interest* is one entitled to protection." *Puapuaga*, 164 Wn.2d at 522 (emphasis added). DOBs are not private, historically or presently.

with their corresponding birthdates" will not be disclosed because doing so "reveals personal and discrete details of the employees' lives." *Id.*

But neither public servants, nor anyone else in Washington, has any reasonable expectation of privacy in their DOBs. Birthdates are "matters of public record," *King Cty. v. Sheehan*, 114 Wn. App. 325, 343, 57 P.3d 307 (2002), and "facts that are of a public nature[.]" *State v. C.N.H.*, 90 Wn. App. 947, 950, 954 P.2d 1345 (1998). Numerous decisions have held that disclosure (whether voluntary or not) of DOBs is not a constitutional privacy violation. *See State v. McKinney*, 148 Wn.2d 20, 60 P.3d 46 (2002) (state driver's license information not protected by art. 1 § 7); *Ino Ino*, 132 Wn.2d at 123 n.4, 124-25 (adult entertainment licensing scheme that required disclosure of employee DOBs did not violate art. 1, § 7); *Peninsula Counseling Ctr. v. Rahm*, 105 Wn.2d 929, 936-37, 719 P.2d 926 (1986) (disclosure of patient names, DOBs and other information as part of healthcare tracking program did not violate art. 1 § 7); *State v. Jorden*, 126 Wn. App. 70, 74, 107 P.3d 130 (2005) (no art. 1 § 7 expectation of privacy in DOBs in motel guest registry), *rev'd on other grounds*, 160 Wn.2d 121, 156 P.3d 893 (2007).[12]

[12] In reversing in *Jorden*, this Court held disclosure of the guest registry invaded privacy because "presence in a motel or hotel may in itself be a sensitive piece of information." *Jorden*, 160 Wn.2d at 129. The decision did not address DOBs.

None of the Respondent Unions' cases are to the contrary. *See* Unions Supp. Br. at 14-15. The cited decisions finding DOBs exempt from disclosure all arise under the records laws of states where privacy exemptions turn on a "balancing test" (such that records are withheld if a private interest outweighs the public interest in disclosure).[13] The PRA ***rejects*** this test: in this state, a public interest in disclosure suffices to overcome any asserted individual privacy interest. *Koenig v. Des Moines*, 158 Wn.2d 173, 185, 142 P.3d 162 (2006); RCW 42.56.050 (privacy under PRA requires ***both*** a privacy interest and lack of legitimate public concern). In any event, none of the cited cases holds that DOBs are private as a constitutional matter.

In Washington, DOBs are not "private affairs." They are publicly disclosed, and readily available, from numerous sources. For example, state law ***requires*** that the DOB of all registered voters be available for public inspection and copying. RCW 29A.08.710(2).[14] Birth certificates, which include both the child and parents' DOBs, are public records,

[13] *Texas Comptroller of Pub. Accounts v. Attorney Gen*, 354 S.W.3d 336, 341 (Tex. 2010); *Oklahoma Pub. Employees Ass'n v. State*, 267 P.3d 838, 842 n.5 (Okla. 2011); *Prall v. New York City Dep't of Corr.*, 10 N.Y.S.3d 332, 335 (N.Y. App. Div. 2015); *Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 955 P.2d 534, 536 (1998).

[14] The statewide voter registration database is available from the Secretary of State's website upon request. *See* https://www.sos.wa.gov/elections/vrdb/extract-requests.aspx. Searchable versions are readily found online, enabling anyone to look up the DOB of any state voter. *See, e.g.*, www.soundpolitics.com/voterlookup.html.

available from the Department of Health and other sources.[15] And, in stark contrast to the blanket suppression the decision below would require, the legislature has expressly recognized that public employees DOBs ***are*** publicly disclosable. RCW 42.56.250(4).[16] The birth *year* of criminal justice agency employees is exempt from disclosure – but even then, the employees have no expectation of privacy, because the full DOB is available to members of the news media. RCW 42.56.250(9).

The Restatement of Torts, which is the basis for the scope of any alleged privacy rights in public records,[17] specifically recognizes that disclosure of DOBs does not implicate privacy:

> [T]here is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, ***such as the date of his birth***, the fact of his marriage, his military record, the fact that he is admitted to the practice of medicine or is licensed to drive a taxicab[.]

Restatement (Second) of Torts § 652D (emphasis added); *Sheehan*, 114

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[15] *See* RCW 70.58.080(1)(a), .104; https://www.doh.wa.gov/LicensesPermitsandCertificates/BirthDeathMarriageandDivorce/OrderCertificates.

[16] This provision, as amended in 2006, exempted certain personal identifiers of public employees from PRA disclosure. The exempt identifiers include home addresses and phone numbers, among other things, but ***not*** DOBs. This was intentional: the same statute exempts from disclosure the DOBs of public employees' dependents and agency volunteers. RCW 42.56.250(4); Laws of 2006, ch. 209, § 6. In 2018, the legislature considered, and ***rejected***, an amendment to RCW 42.56.250 that would have exempted public employee DOBs from disclosure. S.B. 6079 § 1, 65th Leg., Reg. Sess. (2018).

[17] This is true under both the Public Records Act ("PRA") and art. 1 § 7. *See Sheehan*, 114 Wn. App. at 342 (noting PRA privacy provision, now codified at RCW 42.56.050, is derived from Restatement § 652D); *Bellevue John Does*, 129 Wn. App. at 861-62 (asserted constitutional privacy right to nondisclosure of public records "does not yield a different result than the privacy definition in the [PRA]" under RCW 42.56.050).

Wn. App. at 342-43.

WPEA simply ignores that DOBs have long been publicly available in Washington. Neither the decision, nor Respondents' briefing, cites any evidence suggesting otherwise. The notion that there is any expectation of privacy in DOBs – much less one of constitutional magnitude – has no basis whatsoever.

B. ACCESS TO DATES OF BIRTH IN PUBLIC RECORDS SERVES IMPORTANT PUBLIC INTERESTS.

This Court also should hold that public employee DOBs are matters of legitimate and significant public concern. This inquiry is relevant to the constitutional privacy analysis, because an individual has no privacy expectation in matters where "the public has a valid interest." *Bellevue John Does*, 129 Wn. App. at, 861. It is also relevant to the statutory injunction analysis, because under the PRA courts may not enjoin release of public records, even if an exemption applies, unless disclosure "would clearly not be in the public interest." RCW 42.56.540.

WPEA declared that disclosure of DOBs is "not in the public interest because [DOBs] do not inform the public of facts related to a government function." 1 Wn. App. 2d at 237. This assertion is entirely conclusory, unsupported by any evidence or authority. In fact, public employee records, including DOBs, are critically important to public

oversight of government. DOB is the primary identifier used to distinguish a person who is the subject of a public record from persons with similar names who are not the subject of the record. As such, they are an important tool for accurate newsgathering, used to verify individuals' identities and to confirm those serving the public are who they say they are. DOBs are also used to cross-reference public employees who appear in multiple public records.

Journalists working for *amici* and their members have routinely requested, and for years have received from agencies throughout the state, databases of records about public employees that include DOBs. For example, *amicus* Seattle Times reported that over a decade ago that "[h]aving the dates of birth of public-school coaches in Washington was a vital part of our 'Coaches Who Prey' investigative series" about abusive high school coaches and teachers, because "the dates of birth helped the Times track coaches who had moved from one district to another[.]"[18] As this Court has noted, the "Coaches Who Prey" series identified at least 98 Washington State school employees "who were reprimanded, warned, or let go in the past decade because of sexual misconduct" yet "continued

[18] *Watching out for your interests requires access to public records*, SEATTLE TIMES (October 26, 2007), https://www.seattletimes.com/seattle-news/watching-out-for-your-interests-requires-access-to-public-records. The "Coaches Who Prey" series is available at http://old.seattletimes.com/news/local/coaches.

coaching or teaching afterward." *Bellevue John Does*, 164 Wn.2d at 237 (Madsen, J., dissenting) (citation omitted).

Similarly, a 2010 investigation, relying on state pension data containing employee DOBs, found 40 college administrators in Washington "retired" and then were quickly rehired, in a way that enabled them to "double dip" and collect both a salary and a pension.[19] A 2011 news analysis of payroll data, which includes public employee DOBs, showed a surge in Seattle employees earning six-figure incomes.[20]

Access to DOBs in public records also facilitates other public interest investigations. For example, the Seattle Times has reported that its in-depth coverage of the disputed gubernatorial election of 2004 "used the names and dates of birth of registered voters to compare with the names and dates of birth of felons" and that DOB information was essential "to report several stories pointing out flaws in the appeals of the election outcome, and in the election process itself[.]"[21]

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[19] Justin Mayo & Nick Perry, *Retired, then rehired: How college workers use loophole to boost pay*, SEATTLE TIMES (June 26, 2010), https://www.seattletimes.com/seattle-news/retired-then-rehired-how-college-workers-use-loophole-to-boost-pay.

[20] Justin Mayo & Bob Young, *1 in 5 city of Seattle workers earning six figures*, SEATTLE TIMES (Sept. 17, 2011), https://www.seattletimes.com/seattle-news/1-in-5-city-of-seattle-workers-earning-six-figures.

[21] *Watching out for your interests requires access to public records*, Seattle Times (October 26, 2007), https://www.seattletimes.com/seattle-news/watching-out-for-your-interests-requires-access-to-public-records.

These and similar reports are indisputably in the public interest. Assuring such oversight over public servants is one reason the PRA exists. *Daines v. Spokane Cty.*, 111 Wn. App. 342, 347, 44 P.3d 909 (2002) (PRA's purpose "is to keep public officials … accountable to the people"); *see also Sheehan*, 114 Wn. App. at 347 (public has legitimate interest in knowing identity and information about "public employees, paid with public tax dollars."). This type of oversight helps protect citizens from abuse, safeguards the public purse, and keeps government workers honest. Yet under *WPEA*'s ill-considered holding, this reporting would have unconstitutionally violated privacy rights the subjects supposedly had in their DOBs. This Court should recognize public employee DOBs are a matter of considerable public concern, and should reverse.

V. CONCLUSION

The decision below embraces an exceedingly expansive, poorly considered view of constitutional privacy that threatens to suppress access to important public records. It contravenes this Court's recognition that access to public records is foundational to "the sovereignty of the people and the accountability to the people of public officials," *PAWS*, 125 Wn.2d at 251, and that when it comes to public institutions, "[s]ecrecy fosters mistrust." *Dreiling v. Jain*, 151 Wn.2d 900, 903, 93 P.3d 861 (2004). For all of the foregoing reasons, *WPEA* should be reversed.

RESPECTFULLY SUBMITTED this 27th day of April, 2018.

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By _____

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ATTACHMENT

IDENTITY AND DESCRIPTION OF *AMICI CURIAE*

1. Allied Daily Newspapers of Washington, a Washington not-for-profit association representing 27 daily newspapers serving Washington and the Washington bureaus of the Associated Press.

2. Seattle Times Company, publisher of ***The Seattle Times, Yakima Herald-Republic*** and ***Walla Walla Union-Bulletin*** and their respective websites.

3. Washington Coalition for Open Government, an independent, nonprofit, nonpartisan organization dedicated to promoting and defending the public's right to know in matters of public interest and in the conduct of the public's business. WCOG's mission is to help foster open government processes, supervised by an informed and engaged citizenry, which is the cornerstone of democracy. WCOG represents a cross-section of the Washington public, press, and government.

4. Washington Newspaper Publishers Association, founded in 1887, two years before statehood, represents more than 80 weekly and small daily newspapers across the state of Washington and more than a dozen affiliated organizations. It advocates for freedom of speech, transparent government and a free press.

5. Washington State Association of Broadcasters, a not-for-profit trade association the membership of which is made up of 28 television stations and 182 radio stations licensed by the Federal

Communications Commission to communities within the state of Washington. The radio and television station members of WSAB are engaged in newsgathering and reporting on issues and events of public interest to their viewers and listeners, providing their primary source of news and information.

DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the state of Washington that on this 27th day of April, 2018, she electronically filed the foregoing document with the Washington State Supreme Court, which will send notification of such filing to the attorneys of record listed below. The attorneys of record listed below were also served with the foregoing document via first class mail.

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Christine Kruger
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